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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

RONALD L. GASTON,

Plaintiff and Appellant,

v.

KITTEN R. HARMON, as Trustee, etc.,

Defendant and Respondent.

C060653

(Super. Ct. No. SPR5020)

Along with his four brothers, plaintiff Ronald L. Gaston is one of the beneficiaries of a trust created by his mother, Audrey G. Barnes.¹ Along with three of her brothers (and Audrey's), Audrey's sister, defendant Kitten Harmon, is one of the trust's four successor cotrustees. This appeal arises from Gaston's unsuccessful attempt to oust his aunt as a trustee and put himself in her place.

¹ Because there are many Gastons, Barneses, and Harmons involved in this case, to avoid confusion we will refer to the various individuals by their first names, with the exception of plaintiff Ronald Gaston, to whom we will refer by his surname because he shares his first name with one of the other individuals involved.

In concluding that Gaston had "failed to prove facts that warrant the removal of trustee Kitten Harmon," the trial court found Kitten had not impaired the administration of the trust, taken excessive compensation, or failed to comply with other legal duties specified in the Probate Code.²

In seeking reversal of the trial court's refusal to remove Kitten as a trustee, Gaston argues only impairment of the administration of the trust. He contends there is no doubt "that impairment of the administration of the Decedent's trust occurred and is still occurring" and "so long as KITTEN remains as a trustee of the Trust, the same sad situation is likely to continue to exist." As will be seen, however, in making this argument, Gaston fails to follow the applicable rules of appellate review. Accordingly, there is no merit in his appeal, and we will affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2003, Audrey created a living trust. She designated herself as the initial trustee and her four brothers (Ronald Harmon, Milton Harmon, Martin Harmon, and Dale Harmon) and one sister (Kitten) as successor cotrustees. As the trial court found, "The trust was set up in the form [of a] 'special needs trust' because [Audrey's son] Charlie [Barnes] was disabled and he was entitled to distribution of the principal, and the remaining four beneficiaries [-- Audrey's other four

² All further section references are to the Probate Code.

sons --] (Ronald [Gaston], Gary [Gaston], Harold [Gaston], and James [Barnes]) would receive a distribution from the income of the principal at least annually, [25 percent to each] beneficiary."

Audrey died in September 2003. Sometime within the following year, Martin resigned as cotrustee, leaving Ronald, Milton, Dale, and Kitten to administer the trust.

About four and one-half years later, in February 2008, Gaston commenced this proceeding by filing a petition under section 15642 to remove Kitten as cotrustee and to substitute himself in her place. As relevant here, Gaston alleged that Kitten had "failed . . . to cooperate with the other Co-Trustees of the Trust and to perform the duties required of her as a Co-Trustee" and thus was subject to removal under subdivision (b) (5) of section 15642, which authorizes removal "[w]here hostility or lack of cooperation among cotrustees impairs the administration of the trust."

Kitten objected to her removal, and the matter was tried to the court in August 2008. In its statement of decision, the trial court found Gaston had failed to prove that Kitten's actions had impaired the administration of the trust. The court found that "[d]espite . . . apparent animosity between [the] siblings [serving as cotrustees], the evidence at trial demonstrated that since 2003 the trust has basically operated as intended by the trustor, namely, Charlie's needs have be[en] taken care of and the other beneficiaries have been receiving their 25% share of the income proceeds. There was no evidence

presented at trial that there has been a failure to distribute monies as set forth in the trust caused by any disagreement amongst the trustees." The court also found that while "Ronald Harmon^[3] is frustrated with Kitten over the fact that she would sometimes voice a contrary view at trustee meetings causing the meetings and decisions to take longer than he expected," "in the end, his frustration and her contrary opinions ha[ve] not affected the administration of the trust. This conclusion is particularly true given the fact that trustees were authorized to make decisions by majority vote, and, as Ronald Harmon admitted, [Kitten] could be outvoted. Further, Ronald Harmon himself testified that if Kitten were not removed, the trust would continue to function because there were no[t] as many important decisions to be made."

Finding that "Kitten was and is a participating co-trustee member who has regularly attended meetings, performed functions on behalf of the trust, and voiced her opinion to the other trustees regarding how she felt the trust should be operated," the court denied Gaston's request to remove her. Gaston filed a timely appeal.

DISCUSSION

On appeal, Gaston contends there is no doubt "that impairment of the administration of the Decedent's trust occurred and is still occurring" and "so long as KITTEN remains

³ Ronald testified for Gaston and supported his effort to oust Kitten.

as a trustee of the Trust, the same sad situation is likely to continue to exist." Thus, he implicitly asserts that the trial court erred in denying his petition to remove Kitten as a trustee. As we will explain, Gaston has failed to prove this assertion.

Under section 15642, a trustee "may be removed . . . on petition of a . . . beneficiary" "[w]here hostility or lack of cooperation among cotrustees impairs the administration of the trust." (§ 15642, subd. (b)(3).) "The purpose of removing a trustee is not to inflict a penalty for past action, but to preserve the trust assets. [Citation.] 'The question in each case is whether the circumstances are such that the continuance of the trustee in office would be detrimental to the trust.'" (*Getty v. Getty* (1988) 205 Cal.App.3d 134, 139-140.)

"The removal and substitution of a trustee is largely within the discretion of the trial court" (*Estate of Gilmaker* (1962) 57 Cal.2d 627, 633), and we review the trial court's decision for abuse of discretion (see *Tevis v. Butler* (1894) 103 Cal. 249, 250-251). "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) In reviewing the factual determinations underlying the trial court's exercise of its discretion, however, we apply the substantial evidence test. (See *Adoption of Matthew B.* (1991) 232 Cal.App.3d 1239, 1254.) "It is the duty of the trier of fact to determine the credibility of witnesses and the value of evidence and to resolve any evidentiary conflicts. [Citation.]

Thus, so long as substantial evidence supports the trial court's findings, we must affirm." (*Ibid.*)

"Under the substantial evidence test, the evidence on appeal must be viewed in a light most favorable to the prevailing party. [Citations.] Therefore, an order challenged on appeal 'is presumed correct and all intendments and presumptions are indulged to support the order on matters to which the record is silent. It is appellants' burden to affirmatively demonstrate error and, where the evidence is in conflict, [the appellate court] will not disturb the trial court's findings.'" (*People v. \$497,590 United States Currency* (1997) 58 Cal.App.4th 145, 152-153.)

"'It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.' [Citations.] Defendants' contention herein 'requires defendants to demonstrate that there is no substantial evidence to support the challenged findings.' (Italics added.) [Citations.] A recitation of only defendants' evidence is not the 'demonstration' contemplated under the above rule. [Citation.] Accordingly, if, as defendants here contend, 'some particular issue of fact is not sustained, they are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed to be waived.'" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

Here, the trial court decided not to remove Kitten as a trustee on the ground of hostility or lack of cooperation among

the cotrustees because it found that: (1) "although there w[ere] disagreements between Kitten and Ronald about some issues, mostly having to do with how and when monies were distributed to the beneficiaries other than the annual distribution, the disagreements did not and have not risen to the level that has impaired the administration of the trust"; (2) "since 2003 the trust has basically operated as intended by the trustor"; (3) there had not "been a failure to distribute monies as set forth in the trust caused by any disagreement amongst the trustees"; (4) Kitten's "contrary opinions ha[ve] not affected the administration of the trust"; and (5) "Kitten was and is a participating co-trustee member who has regularly attended meetings, performed functions on behalf of the trust, and voiced her opinion to the other trustees regarding how she felt the trust should be operated."

To carry his burden on appeal of affirmatively demonstrating trial court error, Gaston had to persuade us the foregoing findings are not supported by substantial evidence, and to do that he had to set forth in his brief *all* of the material evidence on these points and show us how *that* evidence does not support the court's findings. He did not do either of these things. In his brief, Gaston relies almost entirely on the testimony of his own witnesses, or on his cross-examination of Kitten's witnesses, including Kitten herself. Most notably (but certainly not exclusively), Gaston fails to mention the testimony of Dale, one of the other cotrustees, who, while acknowledging that Ronald and Kitten had disagreements,

testified that he did not "feel there is an impairment from the disagreements to the operation of the trust." Gaston also fails to mention Kitten's testimony on direct examination that while there were differing opinions among the cotrustees, those opinions did not prevent the trust from being administered and "almost 99 percent of the time [they] would all agree eventually." Kitten also acknowledged there were a "very few instances where there was not a complete unanimous voting on at least the largest issues concerning the . . . Trust," and even though she was "on the losing end of the vote," the trust would "still continue to operate."

At no point does Gaston explain why the trial court was not entitled to rely on the foregoing testimony in concluding that whatever hostility or lack of cooperation there was among the cotrustees, it was not enough to impair administration of the trust and therefore not enough to justify removing Kitten as a trustee.⁴ Instead, he insists on advancing his own one-sided view of the case, supported by only his own evidence and not the evidence viewed as a whole in the light most favorable to the trial court's decision.

⁴ To the extent Gaston complains about Kitten taking some of Audrey's jewelry and contends this constituted "a breach of the trust," two observations will suffice: (1) Gaston did not seek to remove Kitten as a trustee for committing a breach of the trust (which is permissible under subdivision (b)(1) of section 15642); and (2) the trial court found Kitten did not wrongly take the jewelry because "Kitten's testimony that her sister Audrey told her she could have some of the jewelry was credible."

The power to remove a trustee, particularly one specifically chosen by the trustor, "is a power that the court should not lightly exercise." (*Estate of Bixby* (1961) 55 Cal.2d 819, 826.) Here, the trial court properly exercised its discretion to deny Gaston's request to remove Kitten as a trustee based on substantial evidence that the administration of the trust was not impaired by the disagreements one could reasonably expect to arise when siblings share control over the assets another sibling has left behind for the benefit of more than one child. Because Gaston has shown neither an abuse of discretion nor a lack of substantial evidence to support the trial court's findings, his appeal fails.

DISPOSITION

The order denying Gaston's petition to remove Kitten as a trustee is affirmed. Kitten is entitled to her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

ROBIE, J.

We concur:

RAYE, Acting P. J.

BUTZ, J.